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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91180742
Party	Plaintiff Dr Pepper/Seven Up, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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DR PEPPER/SEVEN UP, INC.,	:	
	:	
Opposer/Petitioner,	:	<u>Consolidated Proceedings</u>
	:	Opposition No. 91180742
- against -	:	Cancellation No. 92048446
	:	
KRUSH GLOBAL LIMITED,	:	
	:	
Applicant/Registrant.	:	
-----X		

OPPOSER/PETITIONER’S MOTION FOR SUMMARY JUDGMENT

Dr Pepper/Seven Up, Inc., opposer/petitioner in these consolidated proceedings, pursuant to Trademark Rule of Practice 2.127 and Federal Rule of Civil Procedure 56(a), hereby moves for entry of summary judgment in its favor. In support of its motion for summary judgment, Dr Pepper/Seven Up, Inc. submits this combined notice of motion and supporting memorandum pursuant to Trademark Rule of Practice 2.127(a), together with the accompanying declarations of Andrew D. Springate, Laura Popp-Rosenberg and Mario Ortiz, and the exhibits thereto.

INTRODUCTION

For over a century, the mark CRUSH has been associated with a high quality and popular soda marketed by Dr Pepper/Seven Up, Inc. and its predecessors. Against this long history, applicant/registrant Krush Global, Inc. (“Krush Global”) seeks to open in the United States cafés selling a variety of beverages and food under the essentially identical mark CRUSSH.

As set forth in detail below, there is – and can be – no question of law or fact that Krush Global’s registration and use of the CRUSSH mark is likely to cause confusion with the long-used, well-known and federally-registered CRUSH mark. Dr Pepper/Seven Up, Inc. therefore respectfully requests that its motion for summary judgment be granted.

I. STATEMENT OF FACTS

A. Opposer and the Origins of the CRUSH Brand

Dr Pepper/Seven Up, Inc. is a subsidiary of Dr Pepper Snapple Group (“DPSG”). (Declaration of Andrew D. Springate in Support of Opposer/Petitioner’s Motion for Summary Judgment, dated October 31, 2008 (“Springate Decl.”), ¶ 1.) (DPSG and its subsidiaries, and the predecessors of any of them, are referred to collectively herein as “Dr Pepper.”) Today, Dr Pepper is the third largest North American refreshment beverage company. (*Id.* at ¶ 6.) The company manufactures, bottles, markets and distributes more than 50 brands of carbonated soft drinks, juices, ready-to-drink teas, mixers and other premium beverages across the United States, Canada, Mexico and the Caribbean and generates nearly \$6 billion in annual revenue. (*Id.*)

The history of Dr Pepper’s brands spans more than 200 years, and the company’s brand portfolio includes some of America’s most-recognized and best-loved beverages. In addition to its flagship DR PEPPER and SNAPPLE brands, these brands include 7UP, MOTT’S, A&W, HAWAIIAN PUNCH, CANADA DRY, YOO-HOO, and, of course, CRUSH. (*Id.* at ¶ 7.)

CRUSH soda had its beginnings in the early part of the last century. ORANGE CRUSH soda was invented in Chicago in 1906 and later perfected by Clayton J. Howell and Neil C. Ward, who partnered to incorporate the Orange Crush Company in 1916. (*Id.*) CRUSH soda was marketed nationwide beginning in the mid-1920s. (*Id.* at ¶ 10.)

B. The CRUSH Brand Today

i. Product Line, Sales Channels and Sales

Although orange was the first flavor of CRUSH soda produced, other flavors followed. (Springate Decl. at ¶ 9.) Today, the CRUSH product line in the U.S. includes not only Orange, but also Diet Orange, Strawberry, Grape, Peach, Pineapple, Cherry and Tropical Punch. (*Id.* at ¶ 12.)

At the retail level, CRUSH soda is available to consumers in 12-ounce cans (sold individually and in multi-count packages), 12-ounce glass bottles (sold individually and in multi-count packages), 20-ounce plastic bottles, and 2-liter plastic bottles, as well as at select fountain locations. (*Id.* at ¶ 14.) CRUSH soda is a low-cost item priced consisted with other national soda brands, with cans retailing for about 35 cents, 20-ounce plastic bottles for about \$1.07, and a 12-pack of cans for about \$3.22. (*Id.* at ¶ 15.)

CRUSH soda is sold throughout the United States through virtually every channel of trade in which consumers would expect to find soda, including through big-box general merchandisers (such as Wal-Mart and Target), supermarkets, drug stores, convenience stores, food and beverage service outlets and vending machines, as well as over the Internet. (*Id.* at ¶ 16.) The penetration of CRUSH soda in each of these trade channels is extensive. For example, CRUSH soda is sold in nearly Wal-Mart stores, over Safeway supermarkets, over Kmart stores, nearly Food Lion supermarkets, and over Kroger supermarkets, to name just a few specific retailers. (*Id.* at ¶ 16.) Total U.S. distribution exceeds retail stores and food outlets. (*Id.* at ¶ 33.) In the past eleven years, more than the equivalent of billion 12-ounce cans of CRUSH soda have been sold. (*Id.* at ¶ 18.)

During the years 2001 through the first half of 2008, Dr Pepper's approximate U.S. revenue from its own wholesale sales of CRUSH concentrate and finished soda reached \$. (*Id.* at ¶ 20.) Retail revenues from sales of CRUSH would be much higher.

ii. Advertising and Promotion of the CRUSH Mark

Throughout the history of the CRUSH brand, CRUSH soda has been advertised in a variety of media, including in national and local publications (both consumer and trade), billboards, radio, television and the Internet. (Springate Decl. at ¶¶ 26-27, 29.) Because the majority of finished

CRUSH products are made by bottlers and sold by third parties, most of the advertising expenses for CRUSH are incurred by these third parties, which advertise CRUSH in media such as the Internet and weekly circulars. (*Id.* at ¶ 30.) From 2001 through the first half of 2008, Dr Pepper itself spent over \$ marketing the CRUSH brand. (*Id.* at ¶ 31.) Next year, in connection with a refocused push of the CRUSH brand, Dr Pepper has budgeted more than \$ million for consumer advertising and more than \$ million for advertising to the trade. (*Id.* at ¶ 19.)

iii. Other Exposure for the CRUSH Mark

Owing to the reputation, popularity and long history of CRUSH soda, Dr Pepper regularly receives requests to allow the CRUSH brand to be shown in films, television programs, and in books. (Springate Decl. at ¶ 34.) For example, ORANGE CRUSH soda was prominently featured in the popular 1990 movie *Joe Versus the Volcano*, starring Tom Hanks and Meg Ryan. (*Id.*) Dr Pepper also has recently granted third parties permission to reference ORANGE CRUSH in the films *Leatherheads* (2008), *The Shortcut* (projected release 2009), and *Bolden!* (projected release 2010), and in the prime time television show *Swingtown* on CBS. (*Id.*) Dr. Pepper earlier this year also granted permission for ORANGE CRUSH to be referenced in forthcoming books. (*Id.*) Of course, not every reference to the CRUSH brand requires permission from Dr Pepper. Multitudes of fictional works reference CRUSH, including novels by such popular writers as Stephen King, Joyce Carol Oates, and Jack Kerouac. (*Id.* at ¶ 35 and Exh. 26.)

The popularity of historical CRUSH advertisements among collectors (Springate Decl. at ¶ 28) also is a testament to the renown of the brand and its history.

iv. Licensing of the CRUSH Mark

A further testament to the popularity of CRUSH soda is the demand for non-soda items bearing the CRUSH mark. Dr Pepper has for several years actively engaged in extensive

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licensing of the CRUSH mark. (Springate Decl. at ¶ 21.) Dr Pepper licenses the CRUSH mark for a variety of food products as well as for clothing, accessories, stationery, home décor, and cosmetics. (Springate Decl. at ¶ 22 and Exh. 3.) These licensed CRUSH goods serve to extend awareness of the brand to an even larger audience of consumers. In 2008 alone, Dr Pepper estimates that sales of licensed CRUSH goods exceeded \$ million. (*Id.* at ¶ 25.)

v. Consumer Awareness of the CRUSH Mark

Dr Pepper regularly performs consumer surveys that, among other things, test consumer awareness of some of Dr Pepper's brands. Recent surveys consistently show that awareness of Dr Pepper's CRUSH brand among the general population is above %. (Springate Decl. ¶ 38.)

vi. Dr Pepper's Policing Efforts

Dr Pepper actively polices the marketplace and the federal trademark registry to prevent the use or registration of marks that could infringe or otherwise injure the CRUSH brand. (*See* Springate Decl. at ¶¶ 39-40.) Dr Pepper is aware of no other significant uses of CRUSH or CRUSH-formative marks in the United States on or in connection with beverages and none in connection with sodas. (*Id.* at ¶ 50.) There also are no other registered CRUSH or CRUSH-formative marks on the federal registry for non-alcoholic beverages. (Popp-Rosenberg Decl. at ¶ 18.) This is undoubtedly in part due to Dr Pepper's policing efforts and in part due to the well-established position CRUSH occupies in the beverage field. Krush Global has pointed to no third party CRUSH marks for any beverage or food products in the United States CRUSH. (*Id.* at ¶¶ 10-11 and Exhs. 6, 36, 37 & 38.)

vii. Registration of the CRUSH Mark

Because the CRUSH mark represents an asset of substantial value to the company, Dr Pepper has protected its investment by registering the mark. (Springate Decl. at ¶ 41.) Dr

Pepper first registered a CRUSH mark in 1924, and now owns nine U.S. CRUSH registrations: four registrations in Class 32, three registrations in Class 30, one registration in Class 25 and one registration in Class 1.¹ Six of these registrations are incontestable.

C. Krush Global and its CRUSSH Marks

i. Krush Global's Applications for the CRUSSH Marks

On October 5, 2006, Krush Global filed an application under Section 66A of the Lanham Act to register the word mark CRUSSH for “restaurant, catering, snack bar and cafe services; provision of prepared food; food and drink preparation and presentation services; bar services; catering services for the provision of food and drink; preparation of food stuffs or meals for consumption off the premises; sandwich and salad bar services; wine bar services” in International Class 43 (Application Serial No. 79/030,220). Krush Global's U.S. application was based on an international trademark registration recorded with the World Intellectual Property Organization (“WIPO”), IR 0901853, issued October 5, 2006. The U.S. application matured into Registration No. 3,275,548 on August 7, 2007.

On October 10, 2006, Krush Global filed another application under Section 66A of the Lanham Act (Application Serial No. 79/033,050) to register a compound mark as follows:



(the “CRUSSH Logo Mark”), based on International Registration 0908909, issued by WIPO on October 10, 2006. (Krush Global's CRUSSH word mark and CRUSSH Logo Mark will be referred to collectively herein as the “CRUSSH Marks.”)

¹ Since Dr Pepper attached to its Notice of Opposition printouts from the electronic database records of the USPTO showing the current status and title of these registrations, they are of record. 35 C.F.R. § 2.122(d)(1).

Krush Global originally sought to register the CRUSSH Logo Mark in connection with the same services in Class 43 as identified in its word mark application, as well as for a variety of food and beverages in Class 29 and 32. However, after Dr Pepper initiated the opposition proceeding against the CRUSSH Logo Mark, Krush Global on February 19, 2008 submitted through WIPO a request to delete the Class 29 and 32 goods from the application, which limitation was recorded by the USPTO on March 20, 2008.²

ii. Krush Global's Intended Use of the CRUSSH Marks

Krush Global admits that it has not yet offered any services under the CRUSSH Marks in the United States (Admission 18; Doc. Resp. 26),³ and, in fact, has not even entered into any contracts to operate any CRUSSH restaurants in the United States, whether directly or indirectly. (Admission 20.) However, Krush Global does offer restaurant services under the CRUSSH Marks in the United Kingdom, and has stated that it intends to use its CRUSSH Marks in the United States in the same manner that it uses them in the United Kingdom. (Admission 6.)

Krush Global's CRUSSH restaurants in the U.K. offer a variety of beverages, including fresh juices, smoothies, coffee, tea, Coca-Cola and water, as well as food items such as muffins and other baked goods, fruit, yogurt, soup, salads, sandwiches, snacks and desserts. (Popp-

² This amendment was filed without Dr Pepper's consent. Therefore, regardless of the Board's decision on this motion, final judgment should be entered in Dr Pepper's favor with respect to the deleted classes pursuant to 37 C.F.R. § 2.125. See TBMP 602.01 at 600-6.

³ References to "Admission" are to the indicated numbered response(s) in Krush Global's Response to Opposer/Petitioner's First Set of Requests for Admission to Applicant/Registrant, attached as Exhibit 3 to the Declaration of Laura Popp-Rosenberg, Esq., in Support of Opposer/Petitioner's Motion for Summary Judgment, dated November 7, 2008 ("Popp-Rosenberg Decl.") or to the indicated numbered response(s) in Krush Global's Response to Opposer/Petitioner's Second Set of Requests for Admission to Applicant/Registrant, attached as Exhibit 4 to the Popp-Rosenberg Declaration. References to "Doc. Resp." are to the indicated numbered response(s) in Krush Global's Response to Opposer/Petitioner's First Set of Requests for the Production of Documents and Things to Applicant/Registrant, attached as Exhibit 5 to the Popp-Rosenberg Declaration. References to "Interrogatory Resp." are to the indicated numbered response(s) in Krush Global's Response to Opposer/Petitioner's First Set of Interrogatories to Applicant/Registrant, attached as Exhibit 6 to the Popp-Rosenberg Declaration, or to the indicated numbered response(s) in Krush Global's Response to Opposer/Petitioner's Second Set of Interrogatories to Applicant/Registrant, attached as Exhibit 7 to the Popp-Rosenberg Declaration.

Rosenberg Decl. at Exh. 34.) The price of items sold in the CRUSSH restaurants range from £0.85 to £5.82 (approximately \$1.40 to \$9.20.) (*Id.*)

D. United States Marketplace

In the United States, it is very common for companies to use or license a single mark both in connection with restaurant services and in connection with food or beverage items sold at third-party retailers. Indeed, each of the marks identified below are used (directly or through licensees) and registered by the same owner for both food and beverages and for restaurant services:

A&W	DUNKIN' DONUTS	STARBUCKS
BEN & JERRY'S	HÄAGEN-DAZS	STEWART'S
BOSTON MARKET	HOOTERS	TACO BELL
BOB EVANS	MARGARITAVILLE	T.G.I. FRIDAY'S
CALIFORNIA PIZZA KITCHEN	MRS. FIELDS	WHITE CASTLE
CARVEL	NATHAN'S FAMOUS	

(Ortiz Decl. at ¶¶ 3-19 and Exhs. 44-118; Springate Decl. at ¶ 44-46.) Two of the brands identified above are used in connection with beverages distributed by Dr Pepper itself: A&W and STEWART'S. (Springate Decl. at ¶¶ 44-46.)

E. Status of Consolidated Proceedings

The opposition proceeding and the cancellation proceeding in the matter were both filed on November 12, 2007. The opposition proceeding, Opposition No. 91180742, was instituted on November 14, 2007. The cancellation proceeding, Cancellation No. 92048446, was instituted two days later, on November 16, 2007. On November 28, 2008, Dr Pepper moved to consolidate the two proceedings. Krush Global did not object, and the Board granted consolidation on January 22, 2007. Under the consolidated discovery and trial schedule, discovery closed on October 10, 2008 and Dr Pepper's testimony period opens December 9, 2008.

II. ARGUMENT

A. Standard for Summary Judgment

A motion for summary judgment is an appropriate method for disposing of an *inter partes* proceeding when “there is no genuine issue as to any material fact [such] that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *see also* 37 C.F.R. § 2.116(a) (Federal Rules of Civil Procedure generally apply to *inter partes* proceedings). Summary judgment “is regarded as ‘a salutary method of disposition,’ and the Board does not hesitate to dispose of cases on summary judgment when appropriate.” T.B.M.P. § 528.01 at 500-101 (citations omitted). If the moving party meets its burden of proof, “the nonmoving party may not rest on mere denials or conclusory assertions, but rather must proffer countering evidence, by affidavit or as otherwise provided in Fed. R. Civ. P. 56, showing that there is a genuine factual dispute for trial.” *Id.* at 500-102 (citations omitted). However, “[m]ere conclusory statements and denials do not take on dignity by placing them in affidavit form.” *Sweats Fashions Inc. v. Pannill Knitting Co.*, 4 U.S.P.Q.2d 1793, 1797 (Fed. Cir. 1987) (citation omitted).

Likelihood of confusion is “a legal conclusion based on underlying facts.” *Cunningham v. Laser Golf Corp.*, 55 U.S.P.Q.2d 1842, 1843-44 (Fed. Cir. 2000). As such, it is an issue that “the [B]oard may unquestionably resolve . . . on summary judgment.” *Sweats Fashions*, 4 U.S.P.Q.2d at 1797. Here, summary judgment in Dr Pepper’s favor is appropriate because the material facts are undisputed, Krush Global has proffered and will be able to proffer no evidence to the contrary, and a trial would not lead to the discovery or submission of any additional material facts not already in the record.

B. Grounds for Proceeding

To succeed in this proceeding, Dr Pepper must prove that: (1) it has standing; and (2) there are valid grounds why Krush Global is not entitled under law to register the CRUSSH Marks. *Lipton Indus., Inc. v. Ralston Purina Co.*, 213 U.S.P.Q. 185, 187 (C.C.P.A. 1982). As detailed below, Dr Pepper has standing to challenge registration of the CRUSSH Marks by virtue of its prior use and ownership of the nearly-identical CRUSH marks. Further, given Dr Pepper's uncontested prior rights, the undeniable fact that CRUSH and CRUSSH are virtually identical marks, and the fact that the parties' goods and services are related, complementary, and are such that consumers would perceive them to come from the same entity, it is beyond doubt that Krush Global's registration of the CRUSSH Marks violates Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d).

C. There Can Be No Dispute that Dr Pepper Has Standing

Under the Lanham Act, "[a]ny person who believes that he would be damaged by the registration of a mark" may file an opposition, and "any person who believes that he is or will be damaged . . . by the registration of a mark" may file a petition for cancellation. 15 U.S.C. §§ 1063(a), 1064. This threshold standing requirement is satisfied where the opposer or petitioner possesses a "real interest" in the proceeding. *Compuclean Mktg. & Design v. Berkshire Prods. Inc.*, 1 U.S.P.Q.2d 1323, 1324 (T.T.A.B. 1986) (citing cases). As the owner of the CRUSH marks and registrations, Dr Pepper has a "real interest" in challenging the CRUSSH Marks as they are confusingly similar to Dr Pepper's own CRUSH marks.

D. There is No Dispute of Material Fact that the CRUSSH Marks Are Not Entitled to Registration Under Section 2(d) of the Lanham Act

Section 2(d) of the Lanham Act provides that a proposed mark should be refused registration if it:

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

15 U.S.C. § 1052(d).

Here, there are no genuine disputed issues of material fact to controvert Dr Pepper's evidence that (1) it has valid, prior rights in the CRUSH marks; and (2) Krush Global's use of the CRUSH Marks is likely to cause confusion among consumers as to the sponsorship, affiliation or connection of services offered under the marks. *See Hilson Research Inc. v. Soc'y for Human Res. Mgmt.*, 27 U.S.P.Q.2d 1423, 1429 (T.T.A.B. 1993); *see also* 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, §§ 20:14 – 20:18 (4th ed. 1998) (2004). Since, as shown below, Dr Pepper has established both the requisite proprietary rights and that a substantial likelihood of confusion exists, it is entitled to judgment under Section 2(d) of the Lanham Act.

1. It is Undisputed that Dr Pepper Has Valid, Prior Rights in the CRUSH Marks

Krush Global cannot dispute Dr Pepper's valid, prior rights in the CRUSH marks. Dr Pepper's registrations for various CRUSH marks are conclusive evidence of the validity of the registered CRUSH marks and of Dr Pepper's ownership of the marks for the goods specified therein. 15 U.S.C. §§ 1057(b), 1115(a), 1115(b). Also, Dr Pepper's evidence of its longstanding and pervasive use of the CRUSH marks in connection with beverages dating back to 1906 as well as its use of CRUSH on a wide variety of licensed goods since as early as 2003 demonstrates Dr Pepper's common law rights in the CRUSH marks in connection with such goods. *Hydro-Dynamics, Inc. v. George Putnam & Co.*, 1 U.S.P.Q.2d 1772, 1774 (Fed. Cir. 1987) (“[T]rademark rights in the United States are acquired by such adoption and use...”).

Dr Pepper’s unchallenged federal and common law rights in its CRUSH marks long predate any rights Krush Global can claim in the CRUSSH Marks. Krush Global admits that it has not yet used its CRUSSH Marks in connection with any goods or services in the United States and has had only “initial discussions with potential U.S. investors” regarding possible entry into the U.S. marketplace. (Interrogatory Resp. 13.) Thus, the only date Krush Global can rely upon is October 5, 2006, the date of its earlier International Registration on which its U.S. application are based. 15 U.S.C. § 1141(f)-(g). This is a century *after* Dr Pepper’s first use of CRUSH, and more than eighty years *after* Dr Pepper had obtained its first registration for the CRUSH mark. Therefore, no dispute exists regarding Dr Pepper’s priority of rights.

2. *There Can Be No Dispute that CRUSH and CRUSSH Are Confusingly Similar*

In assessing likelihood of confusion, the Board applies the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973).⁴ Although no single factor is generally dispositive, the Board may focus on key considerations such as the similarity of the parties’ marks – which in this case are virtually identical – and the relatedness of their goods and services. *See Hewlett-Packard Co. v. Packard Press Inc.*, 62 U.S.P.Q.2d 1001, 1003 (Fed. Cir. 2002). In making its determination, the Board must resolve any doubts against Krush Global, who, as the newcomer, has the obligation to avoid confusion with Dr Pepper’s existing registered CRUSH marks. *See TBC Corp. v. Holsa Inc.*, 44 U.S.P.Q.2d 1315, 1318 (Fed. Cir. 1997); *Gillette Canada Inc. v. Ranir Corp.*, 23 U.S.P.Q.2d 1768, 1774 (T.T.A.B. 1992).

⁴ There are several *du Pont* factors that are not relevant here. For example, since Krush Global has not yet used the CRUSSH mark in the United States, there cannot have been either actual confusion or concurrent use of the parties’ marks without evidence of confusion, *du Pont*, 177 U.S.P.Q. at 567, and these factors therefore are not relevant. For the same reason, there can be no laches or estoppel issue, *id.*, nor can Krush Global have a right to exclude others from use of the mark. *Id.* Likewise, none of the “market interface” factors mentioned in *du Pont* are relevant here. *Id.*; *see also Opyland USA Inc. v. Great Am. Music Show*, 970 F.2d 847, 850 (Fed. Cir. 1992) (“not all of the *DuPont* [sic] factors are relevant or of similar weight in every case”) (citation omitted).

Analysis of the relevant *du Pont* factors as applied to the marks at issue in this proceeding demonstrates that the CRUSH mark and CRUSH Marks are virtually identical and the goods and services at issue are highly related, such that Applicant's CRUSH marks when used in connection with the listed services are likely to cause confusion, to cause mistake, or to deceive consumers into believing that Applicant's services are somehow associated with Dr Pepper.

a. There Can Be No Dispute that Dr Pepper's CRUSH Marks are Strong and Famous

An important *du Pont* factor is the strength and fame of the senior mark. *See Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 22 U.S.P.Q.2d 1453, 1456 (Fed. Cir. 1992) (a strong mark "casts a long shadow which competitors must avoid"). Factors used to assess a mark's strength and fame include length and extent of use, sales success, extent and duration of advertising and the distinctiveness of the mark. *See du Pont*, 177 U.S.P.Q. at 567; *see also* 15 U.S.C. § 125(c)(2)(A). Here, the analysis of these factors is not actually necessary, since % of consumers are aware of the CRUSH mark, making it a very well-known mark by any standard.

i. *Krush Global Cannot Dispute Dr Pepper's Extensive Use of the CRUSH Marks*

As explained in detail in the Statement of Facts, Dr Pepper first introduced CRUSH-branded beverages in the U.S. more than a century ago, and has continuously sold CRUSH beverages ever since. Today, CRUSH beverage products are sold in over retail stores and over food service outlets, as well as over the Internet. In addition, due to the extreme popularity of CRUSH-branded beverage products, Dr Pepper has licensed use of the CRUSH mark for numerous varieties of food, clothing, accessories, stationery, home décor and cosmetic products, and has authorized the CRUSH brand to appear in movies, books and television programs. It is no surprise that more than % of consumers surveyed recognize the CRUSH

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brand. In short, the evidence conclusively establishes that Dr Pepper's CRUSH marks have been used extensively and broadly, and that the brand is well known throughout the United States.

ii. Krush Global Cannot Dispute the Sales Success of CRUSH-Branded Products

As detailed more fully in the Statement of Facts, CRUSH-branded products have been successfully marketed and sold throughout the United States. Sales of CRUSH soda remain strong and continue to grow nearly a century after the brand's introduction. Millions of bottles and cans of CRUSH-branded beverages have been distributed in U.S. commerce, with Dr Pepper's own sales of CRUSH concentrate reaching \$ in the past seven years alone.

iii. Krush Global Cannot Dispute Dr Pepper's Extensive Advertising

The CRUSH brand has been marketed for a century. Through the years, not only have Dr Pepper and its predecessors expended significant resources to advertise and promote CRUSH products in the United States, but so too have bottlers and retailers. Through their combined efforts, advertising of CRUSH products has extended to all types of media – including print, television, Internet, outdoor media and in-store activities.

iv. Krush Global Cannot Dispute that the CRUSH Marks are Distinctive

As conclusively demonstrated by Dr Pepper's incontestable registrations, the CRUSH marks are distinctive. *See Park 'N Fly v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 196 (1985) ("The language of the Lanham Act . . . refutes any conclusion that an incontestable mark may be challenged as merely descriptive."); *In re Time Warner Entm't Co., L.P.*, Ser. No. 75/100,922, 2000 TTAB LEXIS 229, at *12 (T.T.A.B. Mar. 31, 2000) ("acquired distinctiveness is conclusively presumed for a mark with an incontestable registration"). Furthermore, Dr Pepper knows of no significant third party uses of or registrations for CRUSH or phonetically equivalent marks for beverages, foods or restaurant services, and Krush Global has provided no such

evidence. Accordingly, there can be no disputed material fact regarding the distinctiveness of Dr Pepper's CRUSH Marks.

* * * * *

In sum, multiple factors point to the strength and renown of the CRUSH mark. It is therefore not surprising that the CRUSH mark enjoys consumer awareness levels in excess of %. Moreover, Krush Global has admitted that it has no evidence that Dr Pepper's CRUSH marks are not famous in the United States. (Admission 15.) Given this, there can be no dispute that the CRUSH marks are strong and famous.

b. There Can Be No Dispute that the CRUSH and CRUSSH Marks are Highly Similar

Another key *du Pont* factor focuses on the similarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *du Pont*, 177 U.S.P.Q. at 567. In comparing marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether they are sufficiently similar to be likely to cause confusion as to the source of the goods or services offered under the respective marks. *Sealed Air Corp. v. Scott Paper Co.*, 190 U.S.P.Q. 106, 108 (T.T.A.B. 1975). As such, the focus of the inquiry must be on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *Id.*

i. *CRUSH Word Mark*

With regard to Krush Global's CRUSSH word mark that is the subject of Registration No. 3,275,548, the near-identity of the parties' marks is obvious. Krush Global's word mark CRUSSH incorporates Dr Pepper's entire registered CRUSH mark, differentiated only by the addition of an extra internal letter "s." This slight addition does not differentiate the parties' marks in any appreciable way. Indeed, despite the extra "s," the parties' marks are identical in

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sound⁵ and meaning, are virtually identical in appearance, and as a result, would have the same commercial impression. *See, e.g., O.C. Seacrets, Inc. v. Coryn Group*, Cancellation No. 92,042,854, slip op. at 15 (available at <http://des.uspto.gov/Foia/ReterivePdf?system=TTABIS&flNm=92042854-08-20-2008>) (T.T.A.B. Aug. 20, 2008) (finding SECRETS and SEACRETS highly similar where “the marks differ only by the presence of the silent letter ‘A’” and are phonetically identical); *In re Constellation Wines U.S., Inc.*, Ser. No. 78/803,750, slip op. at 5 (available at <http://des.uspto.gov/Foia/ReterivePdf?system=TTABIS&flNm=78803750-04-17-2008>) (T.T.A.B. April 17, 2008) (T.T.A.B. April 17, 2008) (finding BRICKSTONE and BRICKSTONES highly similar and noting “[p]honetically as well as visually, the absence of the letter ‘s’ is likely to be unnoticed”); *The Dog House, Inc. v. The Dawg House, Inc.*, 138 U.S.P.Q. 466, 467 (T.T.A.B. 1963) (finding the marks DAWG HOUSE for food and DOG HOUSE for restaurant services to be “substantially identical designations”).

Krush Global has no evidence that the CRUSSH word mark makes a different commercial impression than CRUSH, and has no evidence that consumers perceive the marks to have different meanings. (Popp-Rosenberg Decl. at ¶ 13 and Exh. 7.) Thus, there can be no dispute that CRUSH and CRUSSH are highly similar or that this factor overwhelmingly favors Dr Pepper.

ii. CRUSH Logo Mark

Application Serial No. 79/033,050 includes the same CRUSSH word mark discussed above together with a design element consisting of an amorphous shape as follows:



⁵ Although, in response to Request for Admission No. 1, Krush Global denied that the marks have the same pronunciation, this denial defies logic. Aural similarity can be an important component of similarity between marks. *See, e.g., Centraz Indus., Inc. v. Spartan Chem. Co.*, 77 U.S.P.Q.2d 1698 (T.T.A.B. 2006) (ICE SHINE v. ISHINE; similarity in sound “outweighs any differences in appearance and meaning”).

The addition of the design and stylization elements do not erase the near-identity of the CRUSH and CRUSSH marks.

The amorphous design element has no independent significance and does not override the dominant CRUSSH word mark. “[I]t has consistently been held that where a mark comprises a word portion and a design portion it is the word features which are controlling.” *Kabushiki Kaisha Hattori Tokeiten v. Scuto*, 228 U.S.P.Q. 461, 462 (T.T.A.B. 1985); *In re Ginc UK Ltd.*, Ser. No. 78618843, slip op. at 15 (available at <http://des.uspto.gov/Foia/ReterivePdf?system=TTABIS&FINm=78618843-09-04-2007>) (T.T.A.B. Sept. 4, 200&) (citations omitted). This is particularly true “where the design element in [applicant]’s mark consists of ordinary geometric shapes that serve essentially as background for the display of the word and it does little to affect or change the commercial impression created by [the word] alone.” *In re Ginc UK Ltd.*, Ser. No. 78618843, slip op. at 15 (finding that the background design elements did not override the confusing similarity between ZOGGS and ZOG). Quite simply, the design does not change the fact that the marks are pronounced the same and sound the same.

Moreover, the amorphous design element actually is similar to the splash background designs Dr Pepper uses in connection with its CRUSH soda, an example of which follows, thereby serving to increase confusion:



In addition, although Krush Global has not sought to register the CRUSSH Logo Mark in color, it is notable that Krush Global intends to use the logo with orange coloring, as follows:



As ORANGE CRUSH is the strongest selling and best known of Dr Pepper's CRUSH sodas, consumers likely would make a further association between the CRUSSH Logo Mark and Dr Pepper's soda based on Krush Global's use of orange coloring. *See Specialty Brands Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 674 (Fed. Cir. 1984) (trade dress may be considered as "evidence of whether the word mark projects a confusingly similar commercial impression"); *e.g., Gillette Canada Co. v. Kivy Corp.*, Opposition No. 91116804, slip op. at 10-11 (available at <http://des.uspto.gov/Foia/ReterivePdf?system=TTABIS&fNm=91116804-01-29-2003>), 2003 TTAB LEXIS 28, at *11 (T.T.A.B. Jan. 29, 2003) (finding ORAL MAGIC confusingly similar to ORAL-B, where applicant displayed its mark in "the same color that opposer consistently uses to display its mark"); *Uncle Ben's, Inc. v. Stubenberg Int'l, Inc.*, 47 U.S.P.Q.2d 1310 (T.T.A.B. 1998) (finding BEN'S BREAD confusingly similar to UNCLE BEN'S, where applicant displayed its mark in "the same color that opposer consistently uses to display its mark").

As a result of all of the above, there can be no doubt that consumers would associate the CRUSSH Logo Mark with Dr Pepper's CRUSH franchise, and the similarity of marks factor therefore weighs heavily in favor of finding a likelihood of confusion between the CRUSH marks and CRUSSH Logo Mark.

c. There Can Be No Dispute That Krush Global's Planned Services are Closely Related to Dr Pepper's Goods

Another key *du Pont* factor considers the similarity and relatedness of the parties' products and services offered under their respective marks. *du Pont*, 177 U.S.P.Q. at 567. "[T]he greater the degree of similarity in the marks, the lesser the degree of similarity that is

required of the products or services on which they are being used.” *In re Concordia Int’l Forwarding Corp.*, 222 U.S.P.Q. 355, 356 (T.T.A.B. 1983). The goods or services at issue need not be identical for confusion to be likely; there need only be some similarity or relatedness between the goods or services. *In re Melville Corp.*, 18 U.S.P.Q.2d 1386, 1388 (T.T.A.B. 1991).

Here, Krush Global’s planned services under the CRUSSH Marks are highly related to the products on which Dr Pepper has long used its CRUSH marks. Dr Pepper’s CRUSH-branded product line consists primarily of soft drinks. The CRUSH mark also is used in connection with a wider variety of licensed products, including food, as detailed in the Statement of Facts.

Krush Global, on the other hand, seeks registration of its CRUSSH Marks for “restaurant, catering, snack bar and café services; provision of prepared food; food and drink preparation and presentation services; bar services; catering services for the provision of food and drink; preparation of food stuffs or meals for consumption off the premises; sandwich and salad bar services; wine bar services.” Krush Global has described its planned business as a “squeezed fruit drink bar business,” (Interrogatory Resp. 1), identical to that which it currently operates under the CRUSSH Marks in the United Kingdom. (Interrogatory Resps. 19, 21.) In the United Kingdom, Krush Global’s outlets sell a variety of beverages including fruit juices, smoothies, coffee and soda, in addition to various food products. In fact, Krush Global originally sought to register its CRUSSH Logo Mark for such specific beverage products as mineral waters and fruit juices. While it dropped those goods from its application following the institution of these proceedings, the fact that it sought to include these goods in its registration constituted an admission by Krush Global that beverages are related to restaurant, catering, snack bar and café services.

Also, in connection with its U.K. business, Krush Global displays the CRUSSH marks prominently not only in the name of its business, but also on many of the objects used in connection with the sale and advertising of its services, including signs, beverage cups, menus, food containers, and napkins. (Popp-Rosenberg Decl. at Exh. 9.) Krush Global has admitted that it intends to do the same in the United States. Therefore, it is likely that Krush Global's customers could leave a CRUSSH café holding cups emblazoned with the mark CRUSSH, much as consumers walk around drinking out of cans emblazoned with the mark CRUSH.

The federal trademark registry confirms the similarity between food and beverage products and restaurant services, with hundreds of use-based application or registrations covering both categories (Popp-Rosenberg Decl. at ¶ 14-16 and Exhs. 40-42), not to mention the many more marks that have separate applications covering both categories. (*See, e.g., Ortiz Decl. at Exhs. 47, 51, 58, 66, 70, 74, 77, 82, 86, 90, 94, 99, 103, 107, 113 & 118.*) *See In re Albert Trostel & Sons Co.*, 29 U.S.P.Q.2d 1783, 1785-86 (T.T.A.B. 1993) (third party registrations suggest that different goods at issue can emanate from a single source); *O.C. Seacrets, Inc.*, Cancellation No. 92,042,854, slip op. at 18 (same).

The similarity between Dr Pepper's soda and the restaurant services identified in Krush Global's application and registration at issue is further reinforced by the realities of the marketplace. Consumers in the United States are accustomed to seeing well-known brands used or licensed both for beverage or food products available at retail and for restaurant services. For example, Dr Pepper itself uses A&W for soft drinks (most notably root beer) sold in third party stores and licenses A&W for use in connection with casual restaurant. Dr Pepper also distributes STEWART'S soda under license from a company that also licenses the mark for use in connection with fast-food restaurants. Other companies use brands in similar ways. For

example, STARBUCKS is used both for coffee shops and for coffee sold in third party stores, and BEN & JERRY'S, CARVEL and HÄAGEN-DAZS are all used for both ice cream shops and ice cream sold in third party stores.

Consistent with this marketplace reality, the Board often has found a likelihood of confusion in cases involving use of the same or similar marks for food and beverage products, on the one hand, and restaurant services, on the other. *See, e.g., In re Sage Dining Servs., Inc.*, Ser. No. 75/789,623, slip op. at 8-12 (available at <http://des.uspto.gov/Foia/ReterivePdf?system=TTABIS&flNm=75789623-05-07-2003>), 2003 TTAB LEXIS 216, at *9-12 (T.T.A.B. May 7, 2003) (SPLASHES for beverage station services offered onsite to businesses and institutions and FRUIT SPLASHES for fruit drinks and juices); *In re DiLegge*, Ser. No. 75/425,118, slip op. at 5-8 (available at <http://des.uspto.gov/Foia/ReterivePdf?system=TTABIS&flNm=75425118-09-26-2000>), 2000 TTAB LEXIS 676, at *5-10 (T.T.A.B. Sept. 26, 2000) (PASTA COSI for tomato-based pasta sauces and COSI for restaurant services); *see also In re Constellation Wines U.S.*, Ser. No. 78/803,750, slip op. at 6-11 (BRICKSTONE CELLARS for wine and BRICKSTONES for restaurant services); *In re Mucky Duck Mustard Co., Inc.*, 6 U.S.P.Q.2d 1467, 1469 (T.T.A.B. 1988) (likelihood of confusion between MUCKY DUCK for mustard and MUCKY DUCK for restaurant services). The Board should draw the same conclusion here.

d. There Can Be No Dispute That the Parties' Trade Channels Overlap

Another *du Pont* factor that Krush Global cannot dispute is the overlap of the parties' trade channels. Where an applicant's goods or services are broadly described as to their nature and type, the Board must presume that the goods or services identified in the application will move in all normal channels of trade and that the goods or services will be purchased by all

potential customers, including the opposer's own customers. *See In re Elbaum*, 211 U.S.P.Q. 639, 640 (T.T.A.B. 1981).

Given that Krush Global's existing outlets sell third party beverages, such as Coca-Cola, and given that Dr Pepper sells its products to restaurants and other food service outlets, it is evident that the parties' trade channels may not just be similar, they may be identical. The similarity of trade channels factor therefore weighs in favor of likelihood of confusion, and Krush Global can raise no material issue of fact to the contrary.

e. There Can Be No Dispute Regarding the Nature of Consumers

The next *du Pont* factor considers "the conditions under which and buyers to whom sales are made, *i.e.*, 'impulse' vs. careful, sophisticated purchasing." *du Pont*, 177 U.S.P.Q. at 567. As a preliminary matter, Krush Global has admitted that it has *no* evidence that the intended consumers of Krush Global's CRUSHH goods and services would not overlap with consumers of Dr Pepper's CRUSHH goods. (Admission 13; Interrogatory Resp. 22.) Thus, it must be presumed that the consumers overlap. And these consumers are not likely to spend considerable time examining the marks in order to discern any slight difference. Indeed, Krush Global has admitted that it has no evidence that the intended consumers of CRUSHH goods and services are sophisticated. (Admission 14.)

Further, the products and services at issue are low cost and not likely to be subject to careful purchasing decisions. Although Krush Global has not yet begun use of its CRUSHH marks in the United States, its U.K.-based website at www.crussh.com indicates that in Krush Global's U.K. outlets, fruit juices bearing the CRUSHH marks are low cost items starting at about \$5.25. Dr Pepper's beverage products are similarly low-cost items. Thus, the goods and services bearing the respective marks of both parties are inexpensive and would be the subject of

impulse purchases by consumers, particularly thirsty customers. *See In re Int'l Coffee & Tea, Inc.*, Ser. No. 74/475,672, slip op. at 5-6 (available at <http://des.uspto.gov/Foia/ReterivePdf?system=TTABIS&fINm=74475672-04-01-2003>), 2003 TTAB LEXIS 155, at *5-6 (T.T.A.B. April 1, 2003) (finding that coffee goods and services involve the same channels of trade and would be purchased by the same class of consumers since the “goods and services are relatively inexpensive, and would be the subject of impulse purchases”).

f. There Is No Evidence of Third Party Uses That Weaken the CRUSH Marks

Another *du Pont* factor assesses “[t]he number and nature of similar marks in use on similar goods.” *du Pont*, 177 U.S.P.Q. at 567. “Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 73 U.S.P.Q.2d 1689, 1693 (Fed. Cir. 2005) (citations omitted).

Based on the answers Krush Global filed in this proceeding and the documents Krush Global has produced in response to Dr Pepper’s discovery requests, Krush Global seems to want to argue that there are numerous third parties using similar marks on similar goods. Yet, in response to discovery seeking the identity of such third party marks, Krush Global has failed to identify any third party users of a similar mark in the United States, and certainly has failed to provide any evidence of such, as would be necessary to weaken the incontestable CRUSH marks in the United States. (Popp-Rosenberg Decl. at ¶ 10 and Exhs. 36-38.) The most Krush Global has done is to identify registrations in the United Kingdom that include CRUSH. (*Id.*) Krush Global offered no evidence of any use or consumer recognition of the referenced marks in the United States, and in fact has stated that it has no such evidence. (Interrogatory Resp. 4; Admission 21, 22, 23 and 24.) Evidence of registration of similar marks outside the United

States is irrelevant for purposes of a likelihood of confusion analysis and has no probative value in this proceeding.

Accordingly, this factor also strongly supports a finding of likelihood of confusion between the CRUSH and CRUSSH marks.

g. Krush Global Has Acted in Bad Faith

Krush Global's conduct in applying for registrations of its CRUSSH marks demonstrates bad faith. With respect to Registration No. 3,275,548, Krush Global sought to register the word mark CRUSSH only for services in International Class 43. Yet, in Application Serial No. 79/033,050, Krush Global applied to register the CRUSSH Logo Mark for services in International Class 43, as well as for food and beverage items in International Classes 29 and 32. Such actions act as an admission as to the relatedness of such goods and services. Once Dr Pepper filed its opposition, Krush Global amended the application to delete International Classes 29 and 32. Krush Global's purported reason for not including Classes 29 and 32 in its application for the CRUSSH word mark was that it "was not advised by counsel to file in said classes." (Interrogatory Resp. 26.) Krush Global's purported reason for deleting Classes 29 and 32 from its CRUSSH Logo Mark application was "as a courtesy to" Dr Pepper. (Interrogatory Resp. 25.)

The clear subtext is that Krush Global and its counsel were well-aware of Dr Pepper's CRUSH marks and were well aware that Dr Pepper's goods in Class 32 are related to Krush Global's services in Class 43. Accordingly, the evidence strongly suggests that Krush Global has acted in bad faith.⁶

⁶ There is other evidence that Krush Global's respect for the intellectual property rights of others is suspect. For example, one of Krush Global's menu items is "'SUPERSIZE ME' Fruit Salad." (Popp-Decl. at Exh. 8.) "SUPERSIZE ME" is the name of a well-known 2004 documentary film and a reference to a McDonald's trademark.

h. The du Pont Factors Overwhelmingly Favor Dr Pepper

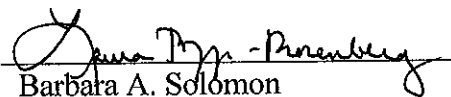
The totality of the *du Pont* factors weigh heavily in favor of Dr Pepper's opposition and petition to cancel Krush Global's CRUSSH Marks. It cannot be disputed as a matter of law that Krush Global's registration of the CRUSSH marks for the identified services in International Class 43 is likely to cause consumer confusion, mistake and deception with Dr Pepper's prior-used and registered CRUSH marks. Because Krush Global cannot raise any material facts to the contrary, summary judgment must be granted to Dr Pepper on the issue of likelihood of confusion between Dr Pepper's CRUSH marks and the CRUSSH Marks shown in Application Serial No. 79/033,050 and Registration No. 3,275,548.

CONCLUSION

For the foregoing reasons, Dr Pepper submits that the undisputed material facts establish a strong likelihood of confusion, mistake and deception arising from registration of Krush Global's CRUSSH Marks. Accordingly, Dr Pepper respectfully requests: (1) that registration of Application Serial No. 79/033,050 be denied (at issue in Opposition No. 91,180,742); (2) that Registration No. 3,275,548 be cancelled (at issue in Cancellation No. 92,048,446); and (3) and that judgment for Dr Pepper be entered in both proceedings.

Dated: New York, New York
November 7, 2008


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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **Opposer/Petitioner's Motion For Summary Judgment** to be deposited with the United States Postal Service as First Class mail, postage prepaid, in an envelope addressed counsel for applicant, Jason Drangel, Esq., 60 East 42nd Street, Suite 820, New York, NY 10165, this 7th day of November, 2008.


Laura Popp-Rosenberg